IN THE CORPORATION COURT OF THE CITY OF STAUNTON, VIRGINIA.

HUTCHINSON'S EXECUTORS *v.* HUTCHINSON'S HEIRS, ETC.

October, 1910.

1. **Bills, Notes and Checks—Protest—Notice.**—Where a note was protested on Dec. 27th, notice of protest mailed to the last indorser and received by him on the 28th, and notice sent by the last indorser to previous indorsers on Dec. 29th, and these notices were received on Dec. 30th, the protesting of this note and the giving of notices of dishonor were in all respects regular under §§ 107 and 108 of the Negotiable Instruments Law.

2. **Wills—Legacies—Right of Executor to Retain Debt Due from Legatee to Estate.**—The amount to which a legatee is entitled is not, accurately speaking, a debt, and the executor may retain an amount sufficient to cancel an indebtedness due from a legatee to his decedent, and this is not, strictly speaking, a set-off.

3. **Same—Same—Same—Debt Due from Partnership of Which Legatee Was Member—Bankruptcy.**—The right to retain from legacy or distributive share a debt due from a bankrupt partnership of which legatee, although bankrupt, was a member, exists and is recognized in equity, even assuming that the rights of the parties are governed by the laws of set-off, although partnership and individual demands cannot be set off against each other, and so in bankruptcy. There are exceptions to this rule and special circumstances may occur creating an equity which will justify its allowance.

4. **Same.**—Where, if such right of retention or set-off were not allowed, additional burdens would fall upon the widow and the other children diminishing their shares so that the indebted legatee might have both his share and his debt paid, there is such a case as justifies the holding that it falls within the exceptions to the general rule as to mutuality of set-off, and the executor should be allowed to retain out of the bankrupt legatee's share a debt due to the estate from a bankrupt partnership of which such legatee was a member, against the claims of the assignee in bankruptcy of such bankrupt firm and of such legatee.

Landes & East, for complainants.
Lucien B. Cox, for defendants.

OPINION.

HOLT, HENRY W., J.: Mr. Henry Hutchinson died at his residence in Staunton, Virginia, on Dec. 16th, 1909, leaving to survive him his widow, Kate A. Hutchinson, and the following

adult, unmarried children, to-wit: George W. Hutchinson, Helen Hutchinson, Kate A. Hutchinson, Mary L. Hutchinson, and Henry H. Hutchinson.

On December 20th, 1909, his will was duly probated, and W. H. Landes and Mrs. Kate A. Hutchinson qualified as executors thereunder. In March, 1910, they instituted this suit, in which they invoked the aid of this court in the administration of their trust. It was duly matured, and on April 21st, 1910, an order of reference was entered. This was executed by Commissioner Kerr, whose report was filed on July 8th, 1910.

This record shows that on November 3rd, 1909, David Larner and George W. Hutchinson, partners doing business under the firm name of Larner-Hutchinson Company, executed to Henry Hutchinson a note for the sum of $1,000. This note was endorsed by Henry Hutchinson, was discounted at the National Valley Bank of Staunton for the benefit of Larner-Hutchinson Company, and was protested for non-payment on May 3rd, 1910—the date of its maturity—and has since been paid by his estate.

It also appears that said firm, on November 26th, 1910, executed to Sitterding-Carneal-Davis Company their note at 30 days for $3,000. This note was endorsed by Thomas Larner, George W. Hutchinson, and H. Hutchinson & Co. It was protested for non-payment on December 27th, 1909. At that time, as we have seen, Mr. Henry Hutchinson was dead. On January 7th, 1910, Larner-Hutchinson Company executed to George W. Hutchinson a note for $3,600 due at four months, payable at the Commonwealth Bank of Richmond, Virginia. This note was endorsed by George W. Hutchinson, Helen Hutchinson, Kate A. Hutchinson, Mary L. Hutchinson, Henry H. Hutchinson, and Mrs. Kate A. Hutchinson, Executrix. Of the proceeds of this note, $3,000 went to take up the original Larner-Hutchinson note of Nov. 26th, 1909, protested for non-payment as aforesaid; while $600, the residue of the proceeds of the said note of January 7th, 1910, was used by the Hutchinson estate to meet certain legitimate demands. While this note is in form the note of Larner-Hutchinson Company, yet it is in substance, as appears from the deposition of William W. Pratt, the note of the Hutchinson estate; and its proceeds, so far as the same

was necessary, were used to pay the indebtedness incurred on the note of November 26th, 1909. Mr. Pratt's evidence fully sustains this proposition. From it we can see that this note was re-discounted and that credit was extended to Henry Hutchinson alone. At that time the Larner-Hutchinson Company was on the verge of bankruptcy. This note also was not paid at maturity, but was, shortly thereafter, by the Hutchinson estate, from the proceeds of a new one on which the name of Larner-Hutchinson Company nowhere appears.

We therefore see that the note of November 26th, 1909, was in substance paid by the Hutchinson estate on January 7th, 1910; and if we assume that this payment cannot be regarded in law to have been actually made then, it was so made in May, 1910, at which time, as we have seen, the name of Larner-Hutchinson Company disappeared from the record of this indebtedness.

On January 26th, 1910, the Larner-Hutchinson Company and Thomas Larner and George W. Hutchinson as individuals, filed their voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Virginia, and were duly adjudged bankrupt. Mr. E. L. Myers was appointed Receiver and Trustee, and answered to the Second April Rules, 1910. Afterwards, and because there was some conflict of interest, Mr. Lucien B. Cox was appointed Receiver and Trustee in his room and stead. Mr. Cox has adopted the answer of his predecessor, and has appeared and has represented himself in the progress of this suit. To the report of Commissioner Kerr he has filed four exceptions. The first of these is:

1. Because the report admits in evidence, as against the said bankrupts and the bankrupt estate, certain notes and testimony regarding same, which it is alleged were given in different form and the renewal of the notes for $1,000 and $3,000 referred to in the bill, when such renewal notes and the testimony regarding same should be excluded as at variance with the bill, as transactions subsequent to the institution of the suit, and, in so far as same might or could affect the said bankrupts or the bankrupt's estate, as being within four months of the adjudication of bankruptcy and of no effect.

Without undertaking to enter into any extended discussion of this exception, the court is of opinion that it is not well taken, and it is accordingly overruled.

The second exception is as follows:

2. Because the Commissioner reports due and proper notice to the endorsers thereon of non-payment and protest of the $3,000.00 note, dated November 26th, 1909, made by Larner-Hutchinson Company, and payable thirty days after date to the order of Sitterding-Carneal-Davis Company, at Commonwealth Bank, Richmond, Va., when such notice does not appear from the evidence.

This note was negotiable and payable at the Commonwealth Bank, Richmond, Va. The notice of dishonor, of the protesting notary, Alexander F. Ryland, is that he did—"At the request of the First National Bank of Richmond, Va., on the 27th day of December, 1909, the year of Our Lord 1909, present the original note hereto attached, at the Commonwealth Bank of Richmond, Va., where the same is payable, and demanded payment thereof (the period limited having expired), which was refused." It is admitted that the notary then certifies that he thereupon addressed formal notices of protest to Thomas Larner, George W. Hutchinson, Henry Hutchinson & Company, and Sitterding-Carneal-Davis Company, and that a separate notice to each one of these endorsers, in one envelope, was addressed, prepaid and mailed, to Sitterding-Carneal-Davis Company, Richmond, Va., informing said endorsers of the demand, non-payment, protest and dishonor of said note, and that the holders looked to them for payment thereon. On the back of this note, as last endorser, appears the name of Sitterding-Carneal-Davis Company, which endorsement is marked out by a pen having been run through the entire name. These notices, in due course, reached Sitterding-Carneal-Davis Company, and that company, on the 29th, forwarded them to Staunton, Virginia, where said endorsers then were. The notice to Henry Hutchinson was enclosed in the notice addressed to Geo. W. Hutchinson, who delivered the same to the Executors on December, 30th, the date on which he received the notice from Richmond. It is believed that the law regarding protest has, in this case, been complied with. We may assume that when protest was made, Sitterding-Carneal-Davis Company were the holders of this note; but from the notices of dishonor which are in evidence of the notary, who states that protest was had at the request of the First National Bank of Richmond, Virginia, it

is clear that said holders deposited said note with said Bank for collection, and that they at the proper time presented it to the Commonwealth Bank, at which institution it was payable.

In the third sub-division of § 108 of the Negotiable Instruments Law, it is said that where "notice is actually received by the party within the time specified in this Act, it will be sufficient." The Record in this case shows that the Receiver and Trustee in Bankruptcy admits the actual notice was sent by the notary to Sitterding-Carneal-Davis Company. Mrs. Hutchinson testifies that she actually received this notice; and it is believed, as a matter of law, that the record shows that she actually received it within the time required by law. That notice, which it is admitted was sent, is the best evidence of what it contained, and was sufficient to warrant the Hutchinson estate in doing what it did do, namely, in recognizing its liability as an endorser and in accepting the liability thus imposed on it. That notice, and the evidence of Mrs. Hutchinson, fully establishes the fact just detailed.

Section 94 of the Negotiable Instruments Law provides that "where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder." So that, if we assume that Sitterding-Carneal-Davis Company were, at the date of said protest, the owners and holders of this note, we must nevertheless hold that they had deposited it with their agent, the First National Bank of Richmond, Va., for collection, and that it presented this note for collection and gave notice of protest to its principal. We may admit that this notary did not take the necessary steps to inform himself of the address of the other endorsers, and that as to them his notice of protest was insufficient. He did certainly give notice to the last endorser, Sitterding-Carneal-Daivs Company, and that was all that was in law necessary, provided that this endorser gave notice to those who preceded him, within the time prescribed by law. Section 107 of the Negotiable Instruments Law provides: "Where a party receives notice of dishonor he has until after the receipt of such

notice the same time for giving notice to the antecedent parties that the holder has after dishonor." To give such notice he has one day—Section 103 of Negotiable Instruments Law. Sitterding-Carneal-Davis Company, on December 29th, forwarded this notice of dishonor to Geo. W. Hutchinson, at Staunton, and with it enclosed the notice to his mother, Executrix. This he handed to her promptly on the day it was received, December 30th. In § 108 of the Negotiable Instruments Law, it is provided: "But where the notice is actually received by the party within the time specified in this Act, it will be sufficient, though not sent in accordance with the requirements of this Section."

This note was protested on December 27th, notice of protest was mailed to the last endorser, Sitterding-Carneal-Davis Company, and was received by them on the 28th, they sent notices to Geo. Hutchinson and to the estate on December 29th and these notices were received on December 30th.

It is true that the endorsement of Sitterding-Carneal-Davis Company on this note is marked out; but the notice shows that protest was had and notice given at the request of the First National Bank of Richmond. These notices were all sent to Sitterding-Carneal-Davis Company. There is no theory on which this action of the notary can be explained, save that said Company was at that time the last endorser. And the protest itself, which is prima facie evidence of what is stated therein, states that this Company was an endorser at the time of protest. See Acts 1908, page 395. The inevitable presumption is, that they were endorsers at that time, that when protest was made and the note returned to them dishonored they held it until those liable thereon, living in Staunton, who actually paid it, notified them of their desire to do so requested that the note be sent here for collection, when they erased their name, and sent it on for that purpose, at which time it was paid to them.

The protesting of this note, and the giving of notices of dishonor, seem to have been in all respects regular, and this exception must be over-ruled.

Said third exception to Commissioner Kerr's report is as follows:

"Because the report, in referring to the $3,000.00 note, says: 'It is admitted that the note was discounted at the Bank by

Sitterding-Carneal-Davis Company'—when such admission does not appear to have been made."

No such admission is made. This exception is well taken and must be sustained.

The fourth exception to said report is as follows:

"Because the report allows the indebtedness of Larner-Hutchinson Company to the estate of Henry Hutchinson, dec'd, as an offset against the interest of George W. Hutchinson in said estate, when the amount due be set-off by the amount due by said Company to said estate."

There is due to the estate of Henry Hutchinson, from the bankrupt concern of Larner-Hutchinson Company, and from Thomas Larner and George W. Hutchinson, four thousand dollars; and there is due to George W. Hutchinson, from the executors of his father's estate, about $2,100. To say that there is due to George W. Hutchinson from his father's estate is not an accurate expression. He is entitled to approximately that sum as a legatee of his father. Since there is controversy as to whether or not George W. Hutchinson is personally liable for said $4,000 indebtedness or any part thereof, that liability will, for the present, be dealt with as a liability of the Larner-Hutchinson Company alone.

The right of an executor to retain from the share of a legatee an amount due by the latter to the estate of the decedent, is undeniably clear. Gosness *v.* Flack, 18 L. R. A. 158 (Md.), Amer. & Eng. Encyc., vol. 25, p. 535; Proctor *v.* Nohall, 17 Mass. 81; Brown's Adm'r *v.* Mattingly (Ky.), 15 S. W. Rep. 353.'

It is important in the beginning to determine what is the character of this right. Is it a set-off, or is it a right which the executor has to retain the legacy until the debt is satisfied?

The amount to which a legatee is entitled is not, accurately speaking, a debt. He cannot maintain an action at law to recover that in judgment, the executor may retain an amount sufficient to cancel an indebtedness due from a legatee to his decedent, although that indebtedness is barred by the statute of limitations. Lomax on Executors, vol. 2, p. 184, says: "A right of this nature in the personal representative of a testator is not a right by way of set-off, which is an expression more properly applicable to mutual demands of debtor and creditor;

but it is more correctly a right which regards a payment out of the fund in hand." In support of this, he cites McMahon *v.* Barchell, 2 Phill. Chy. 127.

In Waterman on Set-off, page 239, it is said:

"In Sims *v.* Doughty (c) which came before Lord Alvanly, he allowed a retainer by the surviving executor, as against the representatives of a deceased executor who was a legatee, but who had wasted a part of the estate.

"A residuary legatee who was indebted to the testator becoming bankrupt, the executor proved the debt in bankruptcy and received a dividend. It was held that the executor had not thereby lost the right to retain the debt less the dividend, out of A's share as residuary legatee (d).

"Sect. 210. The right of the executor or administrator to retain in such cases, depends upon the principle that the legatee or distributee 'is not entitled to his legacy or distributive share, while he retains in his own hands a part of the fund out of which that and other legacies or distributive shares ought to be paid, or which were necessary to extinguish other claims on that fund.' In other words, the legatee or distributee in such cases seeks to obtain a portion of the fund which the testator or the letters of administration have placed in the hands of the executor or administrator; while such legatee or distributee is himself a debtor to the estate, and while withholding payment diminishes the fund to that extent. And it is against conscience that he should receive anything out of the fund without deducting therefrom the amount of the fund which is already in his hands as a debtor to the estate."

The doctrine of retainer is recognized in Alabama: Nelson *v.* Murphy, 6 Ala. 598-605; Godbold *v.* Godbold, 13 S. C. 601; Dennis *v.* Dennis, 37 N. J. Eq. 163-165; Webb *v.* Fuller, 85 Me. 445. And this appears to be substantially the doctrine in Indiana. See Holmes *v.* McPheeters, 149 Ind. 587.

On the other hand, it is true that in a majority of the States the ordinary rules applicable to set-offs obtain; while the textbooks generally treat the subject under the head of Set-Off. So far as we have been able to ascertain, this is an open question in Virginia And it is believed that the doctrine of retainer would be adopted if it were necessary to do so, in a case where equity seemed clearly to demand it.

Assuming, however, for the present, that this doctrine of retainer does not apply let us consider what would follow if we

treat the rights of the parties as governed by the laws of set-off. In doing this, we will first assume that there is no individual liability from George W. Hutchinson to his father's estate such as grows out of the fact that said estate paid notes of a partnership of which he was a member, to the extent of $4,000. As a general proposition of law it is true that partnership and individual demands cannot be set-off against each other. Dunbar *v.* Buck, 6 Munf. 34; Gilliat *v.* Lynch, 7 Leigh 505; Liberty Savings Bank *v.* Campbell, 75 Va. 534. This rule is the rule in bankruptcy. Section 68 of the Bankrupt Act declares that: "In all cases of mutual debt or mutual credit between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid." In § 4 of said Act it is also provided that partnership property shall be devoted to the payment of partnership debts and individual property to the payment of individual debts. Questions of set-off must be determined before any marshalling of assets can be had. Not until the first is settled can it be known what the assets for administration are. We therefore are brought back to this proposition of general law: Set-offs may not be had except in case of mutual debts or mutual credits. Are there any exceptions to this rule? And if so, do they avail where the provisions of the bankruptcy law govern?

Disregarding for the moment the bankruptcy statute, an examination shows that there are a number of well-recognized exceptions to this rule. In Hupp *v.* Hupp, 6 Gratt. 318, it is said: "Equity will not permit an insolvent person who owes a debt to another to recover a debt from his creditor, who must lose his debt, because by some rule of the common law the debt could not be set off." Again in that authority, quoting from Judge Story, in 3 Mason 138, it is said: "I take the general doctrine as to set-off to be the same in equity as at law, joint debts cannot be set off in equity any more than at law against separate debts, unless there be some other circumstances, calling for the equitable interference of the court." It is true this is taken from the argument of counsel in the Hupp case, but it is an argument officially reported on behalf of an appellee in a case which was affirmed. In 34 Cyc. 739, it is said: "In equity, as at law, an individual debt cannot as a general rule

be set up against a partnership debt, and conversely, unless some peculiar equities intervene." That authority then goes on to cite a number of instances in which courts of equity have intervened, in order to do justice between the parties. In Gray *v.* Rollo, 18 Wall. 629, the court quotes with approval from Story's Equity Jurisprudence as follows: "Courts of equity, following the law will not allow a set-off of a joint debt against a separate debt, or conversely, of a seperate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity which will justify such an interposition." In Gosnell *v.* Flack, supra, it is forcefully said: "The right to a distributive share is subordinate from the beginning to the distributee's indebtedness to the estate. If he is charged with the indebtedness, as he should be, he can only receive, in the way of a distributive share, what remains after deducting that indebtedness. In other words, his right to claim any portion of the estate is limited to that portion, if any, which is in excess of what he owes the estate."

In the case at bar, if the right of set-off is denied, it would be peculiarly inequitable in that the additional burdens thereby imposed would fall, not upon George W. Hutchinson but upon Mr. Hutchinson's widow and his other children; their share would have to be diminished in order that George might be paid his share and in addition have his debt paid for him. Argument is not needed to show that this would be against conscience.

But is is said that if we assume that such is the general law, it nevertheless is not the law of this case, that the right to George's legacy is here being asserted by his Trustee and Receiver in Bankruptcy, and that by the very letter of the Statute no set-off can be allowed as against him unless the debts or credits are mutual—§ 68 of the Bankrupt Law. Gray *v.* Rollo, supra, was a case in bankruptcy, and the United States Supreme Court there, as we have seen, said that it was in the power of a court of equity to disregard this hard and fast rule if circumstances were such in good conscience as to demand it.

To meet this it is argued that after all the only circumstance which can be considered is that of insolvency, and that insolvency, in itself, can ever be considered as a sufficient reason to modify any rule in bankruptcy proceedings, which are in them-

selves predicted on insolvency. This is a sound proposition, but it loses sight of the fact that if the letter of this statute is enforced the burden will in truth be borne, not by George but, by his mother and sisters.

In Gray *v.* Rollo, supra, it is said that where one of two joint debtors becomes bankrupt, it seems that the creditor may set off the debt against his separate indebtedness in bankruptcy, because each debtor is liable to him *in solido* for the whole debt. The court in that case, in discussing Tucker *v.* Oxley, 5 Cranch 34, said: "In other words, the case of Tucker *v.* Oxley decides that a joint indebtedness may be proven and set off against the estate of either of the joint debtors who may become bankrupt, and the fact that it may be subject to be marshalled makes no difference. The joint debtors are separately liable in solido for the whole debt." In the case at bar, one of the joint debtors, namely, George W. Hutchinson, has been formally declared a bankrupt. It is a claim of the estate against him, bankrupt both in his individual and firm capacity, which we are asked to set off against his demand against the estate. There seems to be no difference between this case and that in which the Supreme Court has said that set-offs might be allowed. Indeed, although partnership debts are joint and not several, equity will deal with them as joint *and* several when the occasion demands. Story's Equity, § 606; Collier on Partnership, 580; Hammersley *v.* Lambert, 2 John's Chancery 511; Edison Co. *v.* The De-Mott Co., 25 At. Rep. (N. J. Eq.) 952; DeVayne's *v.* Noble, 1 Meriv. 529.

It is urged in this case, in addition, that George W. Hutchinson endorsed the $3,600 firm note as an individual, thus making his liability at law both joint and several. In such a case it seems that he may be regarded as an individual debtor, and all the rights and liabilities which ordinarily obtain attach. That is to say, the executors might prove their claim in the bankruptcy proceedings against him individually. If they did this, there would in any aspect of the case be this mutuality, and a set-off would be allowed. In re Adams, 29 Fed. Rep. 844; Buckingham *v.* Bank, 131 Fed. Rep. 192. But see Bank *v.* Stevens, 107 Fed. Rep. 244.

The trouble here, however, is one of evidence. Upon the

face of the note is the certificate of the notary to the effect that it has been protested. This is all that certificate shows; nothing is said about notice. But there is no evidence that notice was given to George Hutchinson. In this case, that certificate of the notice is not even prima facie evidence of notice to him.

The court has also been cited to the case of Smith *v.* Smith, 3 Giffard 263, an old English case decided in November, 1861. In that case, an executor seems to have been allowed to make a deduction such as is here prayed for. But the case itself is not accessible, and we are unable to rely upon it as an authority.

By the way of recapitulation, the court is of opinion, in this case, in view of the equities, the executors' right should not be restricted by the technical rules of set-off, but should approximate more nearly to those which obtain where the doctrine of retainer is recognized.

The court is further of opinion that if we are dealing with set-off in its technical sense, that this is a case which justifies us in holding that it falls within the exceptions to the general rule as to mutuality of off-set, and should be allowed.

The court is further of opinion that said exception should be overruled, because it is in conflict with the law as laid down by the United States Supreme Court in Tucker *v.* Oxley, supra, as explained and affirmed in Gray *v.* Rollo, supra.

This exception will therefore be overruled.

A decree may be drawn in accordance with this opinion.

Note.

The case of Smith *v.* Smith, 3 Giffard 263 (66 Eng. Rep., Full Reprint, 408), is a case precisely in point upon the question involved here, and directly and emphatically supports the conclusion reached by Judge Holt in this case. In that case there were legacies from the testator to several of his children, one of whom was a member of a partnership which had become bankrupt and which owed a large sum to the testator. The court discussed the right to set off such indebtedness against the claims of the assignees in bankruptcy to receive the legacies, and said that the term "set-off" was an inaccurate expression, and that the right is rather a right of the executor to retain a sufficient part to satisfy the debt. After holding that there was no difficulty in the way of such retention or set-off where the debt was due from the legatee, the Vice-Chancellor (Sir John Stuart) said: "On the second point, the question is whether the same principle applies where a debt is not due from the legatee, but from the partnership firm of which that legatee was a member. No direct authority has been cited on either side. It seems to me that the

principle which governs the case is this, that the legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator until he has paid all his obligations in the shape of debts which may be due to that estate. That seems to be an intelligible principle; and it is one which was stated by Lord Cottenham in the case of Cherry *v.* Boultbee (2 Keen, 319; S. C. on appeal, 4 M. & C. 442). In that case Lord Cottenham said that the principle would be applicable, where the executor, who was bound to pay the legacy, was the same person who was entitled to receive payment of the debt. It seems to me that the principle which I have stated is countenanced by what was said by Lord Cottenham in that case. I cannot satisfy my mind that it would be an intelligible principle to act upon, or that I should be justified in making an order that the assignees of this bankrupt partner should be allowed to receive the legacy given to an individual partner who is the legatee, so long as the partnership debt of the firm of which he was a member remains undischarged. I do not think 'retainer' or 'set-off' is a proper expression, for it is not a question of retainer or set-off, but a question of right on the part of the legatee to receive payment of the legacy, having regard to the amount of the debt due to the testator's estate. The declaration will be in those terms."

It will no doubt be a satisfaction to Judge Holt to know that his decision of this quite difficult point is so aptly supported by this old case, and the "Virginia Law Register" tenders him its hearty congratulations on his well deserved promotion to the Circuit Bench.

J. F. M.

SUPREME COURT OF APPEALS OF VIRGINIA.

ATKINSON *et al. v.* SOLENBERGER *et al.*

Nov. 17, 1910. On Rehearing, Nov. 16, 1911.

[72 S. E. 727.]

1. Trial (§ 2*)—Trial of Causes Together.—An order that two causes be proceeded with and heard together does not have the effect of making depositions taken in one of them, before the order, evidence in the other; the parties thereto not being the same, and the effect of hearing the two together not being to make them one cause.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 2.*]

2. Fraudulent Conveyance (§ 248*)—Suit to Avoid—Limitations.—Code 1904, § 2929, declaring a limitation of five years for bringing suit to avoid a conveyance, for the cause only that it was not on a valuable consideration, while applying where the grantee receives it without reason to suspect the grantor was insolvent and without any purpose to defraud his creditors, does not apply where one, with

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.